

ISSUED APRIL 19, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD  
OF THE STATE OF CALIFORNIA

LUCKY STORES, INC. DELAWARE	)	AB-7319
dba Sav-On-Drugs	)	
731 Weir Canyon Road	)	File: 20-295804
Anaheim, CA 92808,	)	Reg: 98043516
Appellant/Licensee,	)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Rodolfo Echeverria
	)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	March 2, 2000
	)	Los Angeles, CA

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Lucky Stores, Inc. Delaware, doing business as Sav-On-Drugs (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended its license for 15 days for appellant's employee having sold an alcoholic beverage to a person under the age of 21, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article

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<sup>1</sup> The decision of the Department, dated December 10, 1998, is set forth in the Appendix.

XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Lucky Stores, Inc. Delaware, appearing through its counsel, John Hinman and Beth Aboulafia, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. David W. Sakamoto.

#### FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on July 1, 1994. Thereafter, the Department instituted an accusation against appellant charging that, on January 17, 1998, appellant's clerk, Kevin Robertson (hereinafter "the clerk"), sold beer to Kory Dwane McGranahan (hereinafter "the decoy"), an 18-year-old decoy working with the Anaheim Police Department.

An administrative hearing was held on October 6, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Michael M. Nichols, an investigator with the Anaheim Police Department; Kory McGranahan, the decoy; Liza Lucero, the Sav-On Drugs store manager; and Kevin Robertson, the clerk.

Subsequent to the hearing, the Department issued its decision which determined that the sale of an alcoholic beverage to a minor had occurred as charged, and that no defense pursuant to Rule 141 or Business and Professions Code §25660 had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issue: The Department improperly applied the requirement of Rule 141(b)(2) in evaluating the apparent age of the decoy.

#### DISCUSSION

Appellant contends the Department did not properly apply Rule 141(b)(2) in evaluating the appearance of the decoy.

The ALJ stated, in Finding III. 1.:

“Although [the decoy] was six feet in height and weighed about two hundred forty-five pounds as of January 17, 1998, his youthful looking face is such that it would be reasonable [sic] to consider him as being under twenty-one years of age and reasonable to ask him for identification to verify that he could legally purchase alcoholic beverages. The minor’s appearance at the time of his testimony was substantially the same as his appearance at the time of the sale. The photograph depicted in Exhibit 2 was taken on January 17, 1998 and it accurately depicts his appearance on that date.”

The problem with this finding is that the ALJ appears to focus solely on the decoy’s physical appearance, a circumstance that has resulted in reversal in a number of prior cases. Exacerbating this, the determining factor seems to be on the decoy’s *face* alone. The ALJ’s characterization of the decoy’s face as “youthful looking” is no help, since a 40-year-old could be said to be youthful looking.

The ALJ did consider the decoy’s size, but rejected that as making the decoy look over 21 because his face made him look under 21. This is still only consideration of physical appearance, however. Consistent with prior cases, this decision should be reversed on the basis that the ALJ did not demonstrate that he considered anything other than the decoy’s physical appearance in determining

whether he displayed the appearance of a person under 21. The Department, in its brief, basically concedes that the wrong standard was used.

ORDER

The decision of the Department is reversed.<sup>2</sup>

TED HUNT, CHAIRMAN  
RAY T. BLAIR, JR., MEMBER  
E. LYNN BROWN, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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<sup>2</sup>This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code §23090 et seq.